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## FEDERAL INCORPORATION AND CONTROL

By Frank B. Kellogg, of the Minnesota Bar.

*The Congress has power to provide for federal incorporation of railways and industrial companies to engage in interstate commerce, and may also by federal license control companies incorporated under the laws of the states and engaged in, or about to engage in, interstate commerce as a part of their business.*

The foregoing propositions are so cognate that they will, to some extent, be considered together. It will probably not be denied that Congress may provide for the incorporation of companies to engage exclusively in interstate commerce, but it is by many claimed that it has no power to incorporate a company to engage both in interstate and intrastate commerce, and in any event it may not regulate the internal affairs of companies incorporated under the laws of the states although engaged in, or about to engage in, interstate commerce. These propositions lead us to a somewhat extended examination of the whole field. We believe it may be stated as a general proposition that where the creation of a corporation is a proper, useful, necessary or needful means of executing the powers of government or exercising any <sup>1</sup> of the specific powers conferred by the federal constitution, such corporation may be created or controlled by the federal government, although a part of its business may not be necessary to the exercise or carrying out of such powers. I shall first consider this under the clause of the federal constitution to regulate commerce. The power of Congress to regulate commerce is not confined to the control of the act of transporting persons or goods. It includes the power to employ all means necessary or proper to make such regulations effective. Pursuant to this power Congress may therefore regulate the instrumentalities engaged in interstate commerce and affecting the same.<sup>2</sup>

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<sup>1</sup> *McCulloch v. Maryland*, 14 Wheat., 316, 407.

<sup>2</sup> *Interstate Commerce Commission v. Ill. Central R. R.*, 215 U. S., 472, 475; *Gibbons v. Ogden*, 9 Wheat., 1; *The Daniel Ball*, 10 Wall., 557, 565; *Hall v. De Cuir*, 95 U. S., 485; *Wabash Ry. v. Illinois*, 118 U. S., 557; *Kidd v. Pearson*, 128 U. S., 1; *Hopkins v. United States*, 171 U. S., 597; *Northern Securities Co. v. United States*, 193 U. S., 344; *Johnson v. Southern Pacific Co.*, 196 U. S., 22; *Hale v. Henkel*, 201 U. S., 75; *Schlemmer v. B. R. & P. R. Co.*, 205 U. S., 1; *Employers' Liability Cases*, 207 U. S., 463; *Stockton v. Balt. & N. Y. R. Co.*, 32 Fed., 17; *Perkins v. Northern Pac. Ry. Co.*, 155 Fed., 454; *United States v. Colorado & N. W. R. Co.* (C. C. A., 8th Cir.), 157 Fed., 321.

If a given subject affects or is connected with interstate commerce, Congress can take hold of and legislate in regard to it with the same freedom as if there were no state lines. Its power is complete and dominant. It has the full powers of any national legislature acting upon subjects within its jurisdiction. These powers are not less because the subject on which it legislates is delegated by the Constitution of the United States.<sup>3</sup> In *Hale v. Henkel* the court held that a corporation receiving its franchises from the legislature of a state must exercise its powers in doing interstate business in subordination to the powers of Congress, and in this respect the powers of the general government "are the same as if the corporation had been created by an act of Congress."<sup>4</sup>

Again, it has been held that in the exercise of the power to regulate commerce Congress may deal with all the instrumentalities by which such commerce is conducted. In *Hopkins v. United States*,<sup>5</sup> the court said of commerce and the commerce clause:

"It comprehends, as it is said, intercourse for the purposes of trade in any and all its forms, including transportation, purchase, sale and exchange of commodities between the citizens of different states, and the power to regulate it embraces all the instruments by which such commerce may be conducted."

In speaking of the same subject, Mr. Justice Harlan, in the *Northern Securities Case*, said: "The power of Congress over commerce extends to all the instrumentalities of such commerce."<sup>6</sup>

In the case of *Interstate Commerce Commission v. Illinois Central R. R.*,<sup>7</sup> it appeared that coal intended for the use of the railway company was received in company cars at the tipple of the coal mine and transported by it to various places on its line where it was necessary for the company's use. The court held that the cars thus used were instrumentalities of interstate commerce, and that the Commission might control their disposition in the division of cars among coal mines.

What, therefore, is an instrumentality of commerce? It is not merely the cars and engines used for transportation, or the road-bed and tracks on which they run. The corporation by which the

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<sup>3</sup> *Gibbons v. Ogden*, 9 Wheat., 1.

<sup>4</sup> *Hale v. Henkel*, 201 U. S., 75.

<sup>5</sup> 171 U. S., 597.

<sup>6</sup> 193 U. S., 344.

<sup>7</sup> 215 U. S., 472, 475.

commerce is conducted, as was decided in the *Northern Securities* case, is in itself an instrumentality, and Congress may regulate all the machinery of such a corporation, whenever it enters into interstate commerce. True, the cars and engines are the direct means by which the freight is carried, but the corporation is no less an instrumentality than the roadbed, the stations, the telegraph instruments, and the employees operating trains. Congress has passed many laws regulating certain of these instrumentalities more or less remote from the immediate carriage of the goods, such, for instance, as the Employers' Liability Act, establishing rules of liability as between the railway corporations and its employees engaged in interstate commerce, which the Supreme Court has held are subject to regulation.<sup>8</sup>

The establishment of the rule of liability between the employee and the corporation for injuries received by the former is certainly as remote from interstate commerce as the regulation of the dealings between the officials and the company or the terms upon which corporate stock shall be issued.

Another instance of such regulation which may be cited is the Safety Appliance Act, which was held valid in the case of *Johnson v. Southern Pacific Co.*,<sup>9</sup> in which it was decided that the act applied to dining cars, although at the particular time the car was not making an interstate journey. It was claimed that the dining car could not be considered an instrument of interstate commerce until it was actually engaged in interstate movement or put in a train for such use, under the rule in *Coe v. Errol*,<sup>10</sup> holding that logs hauled to a river to be transported were subject to local taxation before the transportation had begun.

Again, it is said that for Congress to create corporations engaged in interstate commerce, with power also to engage in intrastate commerce, or to regulate state corporations engaged in the former commerce, might result in conflict with the laws of the state. The answer to this is that within its sphere the power of Congress is supreme. We must not lose sight of the difference between the power of Congress over interstate commerce and the power of the states over intra-state commerce. While undoubtedly each is supreme within its own distinctive jurisdiction, if regulations conflict to any extent, the action of Congress is con-

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<sup>8</sup> *Employers' Liability Cases*, 207 U. S., 494.

<sup>9</sup> 196 U. S., 1.

<sup>10</sup> 160 U. S., 571.

trolling under the Sixth Article of the Constitution, which provides:

"This constitution and the laws of the United States which shall be made in pursuance thereof, \* \* \* shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

In *Gibbons v. Ogden*,<sup>11</sup> Chief Justice Marshall settled for all time the supremacy of the federal power over interstate commerce. He held that the power was plenary and exclusive of state control or interference; that when necessary to effectuate the regulations adopted by Congress, the exercise of the power does not stop at state lines, nor yield to the power of the state, even though exercised in the regulation of its purely internal affairs; that, while conceding to the states exclusive jurisdiction over their internal affairs—such as municipal control, taxation, the control of purely internal commerce—yet, whenever state laws or regulations come into conflict with the exercise of the power committed to Congress, necessary to the control of interstate commerce, the state regulations must yield.<sup>12</sup>

*It cannot at this day be disputed that Congress may create federal corporations for the purpose of carrying out any of the powers specifically conferred by the Constitution of the United States.*<sup>13</sup>

In the case of *Wilson v. Shaw*, the court quoted from the opinion of Mr. Justice Gray, in the *North River Bridge* case, as follows:

"Congress, therefore, may create corporations as appropriate means of executing the powers of government, as, for instance, a bank for the purpose of carrying on the fiscal operations of the United States, or a railroad corporation for the purpose of promoting commerce among the states."

It is not necessary to go into an extended examination of authorities to sustain this position. The incorporation of the national bank and the decisions of the Supreme Court of the United States sustaining the same afford a striking parallel and convinc-

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<sup>11</sup> 9 Wheat., 1.

<sup>12</sup> See also *Kidd v. Pearson*, 128 U. S., 1, 18; *Leisy v. Hardin*, 135 U. S., 100; *Addyston Pipe & Steel Co. v. United States*, 175 U. S., 211-227; *United States v. Colorado & N. W. R. Co.*, 157 Fed., 321.

<sup>13</sup> *McCulloch v. Maryland*, 4 Wheat., 316, 407; *Osborn v. United States Bank*, 9 Wheat., 859, 867; *California v. Pacific R. R. Co.*, 127 U. S., 1-39; *Wilson v. Shaw*, 204 U. S., 25, 34.

ing authority for the construction of the commerce power for which I contend. One needs again to read the opinions of Chief Justice Marshall in these remarkable cases in order to appreciate thoroughly how completely they sustain these powers. In the first case,<sup>14</sup> the Chief Justice, writing the opinion of the court, held not only that Congress had power to incorporate a national bank as a proper and necessary means of carrying into execution the granted powers under the Constitution, but had complete control over all its business, whether that business was the execution of a governmental power or private business, and, therefore, that the states had no power to tax the property of such banks without the consent of Congress. It was not claimed that there was any express power conferred upon Congress to incorporate a national bank. The power to do that was inferred from the powers to lay and collect taxes, to borrow money, to regulate commerce, to declare and conduct war, and to raise and support armies and navies. It was held that a bank was a proper, necessary, needful, requisite or essential means of carrying these powers into execution under the provision of the Constitution authorizing Congress to make "all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof." In construing the word "necessary" the Chief Justice said that it meant "needful, requisite, essential, conducive," to the carrying out of such powers.<sup>15</sup>

This subject came again before the court in the case of *Osborn v. United States Bank*,<sup>16</sup> at which time the court re-examined the questions theretofore decided in *McCulloch v. Maryland*, and the reasoning in that case goes even further to sustain the position I take. It was contended that the principal business of the bank was private trade and profit, such as discounting bills and notes and loaning money, which had no relation whatever to any function of the federal government; that while Congress might have power to incorporate a company to execute the governmental powers, it had no power to incorporate a company to do a business not within any of the granted powers under the Constitution. Speaking of the power of the bank, the Chief Justice said:

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<sup>14</sup> *McCulloch v. Maryland*, 4 Wheat., 400.

<sup>15</sup> Pages 412-423 of opinion.

<sup>16</sup> 9 Wheat., 859.

"It is, undoubtedly, capable of transacting private as well as public business. While it is the great instrument by which the fiscal operations of the government are effected, it is also trading with individuals for its own advantage. The appellants endeavor to distinguish between this trade and its agency for the public, between its banking operations and those qualities which it possesses in common with every corporation, such as individuality, immortality, etc. While they seem to admit the right to preserve this corporate existence, they deny the right to protect it in its trade and business.

"If there be anything in this distinction, it would tend to show that so much of the act as incorporates the bank is constitutional, but so much of it as authorizes its banking operations is unconstitutional. Congress can make the inanimate body, and employ the machine as a depository of, and vehicle for, the conveyance of the treasure of the nation, if it be capable of being so employed, but cannot breathe into it the vital spirit which alone can bring it into useful existence. Let this distinction be considered.

"Why is it that Congress can incorporate or create a bank? This question was answered in the case of *M'Culloch v. The State of Maryland*. It is an instrument which is 'necessary and proper' for carrying on the fiscal operations of government. Can this instrument, on any rational calculation, effect its object, unless it be endowed with that faculty of lending and dealing in money, which is conferred by its charter? If it can, if it be as competent to the purposes of government without, as with this faculty, there will be much difficulty in sustaining that essential part of the charter. If it cannot, then this faculty is necessary to the legitimate operations of government, and was constitutionally and rightfully engrafted on the institution. It is, in that view of the subject, the vital part of the corporation; it is its soul; and the right to preserve it originates in the same principle with the right to preserve the skeleton or body which it animates. The distinction between destroying what is denominated the corporate franchise, and destroying its vivifying principle, is precisely as incapable of being maintained, as a distinction between the right to sentence a human being to death, and a right to sentence him to a total privation of sustenance during life. Deprive a bank of its trade and business, which is its sustenance, and its immortality, if it have that property, will be a very useless attribute."

I do not pretend to quote all of this opinion which bears upon the question. Without reading the entire opinion, no one can appreciate how completely the reasoning of the Chief Justice covers the whole field. It may be said, however, that while the court held that the bank might not be incorporated simply to do a private business in no way connected with carrying out powers specially conferred by the federal constitution, it also said that

if a part of the business was proper and necessary in carrying into execution those powers, then Congress might not only incorporate it, but would have exclusive control of all of its functions and prevent the state from interfering therewith, even to the extent of levying a tax upon its property. If this is true as to banks, it is equally true as to other corporations which are convenient means of carrying out the powers conferred by the federal constitution. Take, for example, railroads. Congress may incorporate them either under the provision of the Constitution giving Congress power to regulate commerce among the states and with foreign nations, or under the provision of the Constitution granting the power "to establish postoffices and post roads." It matters not whether their business may consist largely of carrying persons and property between the states or exclusively within the borders of a state. If the corporation is a proper, necessary or needful means of executing the powers of government or of carrying out the constitutional powers of Congress, it may be done. If it was true in the very beginning of the federal government that a corporation was a proper and necessary means for carrying on the business or executing the express powers of the federal government, all the more is it true at the present time. It is a well known fact that the assembling of sufficient capital to carry on many of the great enterprises pertaining to interstate commerce or the carrying of mails, is more properly and conveniently done through the instrumentality of a corporation. Especially is this true as to railroads, but the principle is the same as to any association assembling capital for the purposes of carrying out any of the express powers conferred by the Constitution. It was stated in the case of *Osborn v. The United States Bank*, that to deprive the bank of its trade and business would make it a useless attribute of the government. Why? Because no one would invest money in a bank simply as a government depository, or to enable it to collect government funds and pay them out. But if it may also engage in a private business, such as discounting paper, making collections, loaning money, etc., it becomes therefore a valuable instrument in carrying out the legitimate operations of the government. This principle is equally true with regard to railroads. It is not practicable to incorporate a railroad simply to carry the mails or to do exclusively interstate commerce. The commerce which is intra-state is so intermingled with interstate commerce and the doing of the one is so necessary to the other that it is certainly not practicable to have railways incorporated, one to do



interstate business exclusively and the other intra-state business. It may be said, then, that the incorporation of railroads should be relegated exclusively to the states. This means that the federal government should relinquish one of its most valuable incidental powers. There are many reasons why corporations engaged almost entirely in the great commerce between the states, should be regulated and controlled by federal authority. It has been decided by the courts that the states are absolutely without power to make and enforce many regulations necessary for the proper conduct of interstate commerce. This is particularly true of trusts and combinations, and it is generally believed that one of the most effective means of controlling these trusts is to provide for federal incorporation.

As decided in the *Bank Cases*, Congress may create a corporation with authority not only to carry out the powers expressly conferred by the federal constitution, but also to do a private business. It is difficult to see why Congress may not incorporate railroads or industrial corporations to effectuate the provisions of the federal constitution, and incidentally to do intrastate commerce necessarily connected with, and of the same nature as the interstate commerce. It was said in the *Bank Cases* that it has never been supposed that Congress could create a corporation simply to do a private banking business, but that private banking was a necessary adjunct to a profitable enterprise, and therefore was a proper means for carrying out the governmental functions. The same argument may apply to railroads and industrial corporations. The intra-state commerce is proper and necessary in order profitably to carry on interstate commerce. They cannot be separated. It is a matter of congratulation that the great Chief Justice in writing the opinions in these cases saw, with prophetic vision beyond any one of his time, a commerce between the states growing to vast proportions until it should become the very life-blood of a great commercial nation. He saw as to that commerce in this country one great nation—the products of every state transported and consumed in all parts of the country and flowing in streams to foreign nations. The time was when transportation was not such a great factor. The principal commerce of the country was the interchange of products in the local market. But to-day a transportation charge is a legitimate tax upon all commerce. The farmer, the merchant, and the manufacturer must pay his tribute to the great transportation lines of this country. It is equally true of industrial corporations. Their

business is now principally interstate. More and more is the wisdom of their incorporation by the federal government (certainly of their control) becoming apparent to the people. Is it possible that Congress may not use one of its most valuable incidental powers, the power of incorporation, because the corporate entity when once established, may wish to do some business which is not interstate? As well might we say that Congress could only incorporate a railroad to carry the mails.

The court said in the Pacific railroad cases that there could be no doubt that, under the power to regulate commerce among the several states as well as to provide postal accommodations and meet military exigencies, Congress had authority to incorporate railways. There may be reasons why Congress should not extend this power of incorporation to industrial corporations, but they are reasons which appeal solely to the legislative body and not to the courts. The power under the Constitution to create corporations to engage in commerce other than transportation, is the same as the power to create corporations to engage in transportation, and as the Supreme Court has often said, conceding the power to exist, the means by which Congress executes such power are solely for the legislative branch of the government.<sup>17</sup>

*As a necessary corollary, it would seem clear that Congress may, as a condition to permitting a state corporation to engage in interstate commerce, prescribe limitations upon the manner of doing its business, the amount of capital it shall have, the manner of issuing and paying for the same upon its corporate organization, and upon the action of its officers in dealing with the company.*

It has been said that if Congress could regulate those matters which are properly subjects of state legislation in the creation of corporations, it could authorize the consolidation of purely intrastate corporations or regulate their domestic affairs and corporate powers, even though they confined themselves absolutely to domestic business. There is no foundation for this argument. There is a wide difference between authorizing purely domestic corporations to consolidate, and providing as a condition to permitting them to engage in interstate commerce that if they do so engage in such commerce they shall not consolidate or com-

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<sup>17</sup> *McCulloch v. Maryland*, *supra*.

bine or restrain or monopolize interstate commerce, or pay dividends beyond a certain rate, or that the officers thereof shall not deal with such corporations, or that the corporations shall not issue fictitious stock or otherwise imperil their financial standing. These are regulations which Congress may impose as a condition when state corporations project themselves into the domain of interstate commerce. Congress may declare that all corporations organized under the laws of any of the states, as a condition of engaging in interstate commerce, shall comply with such regulations as it may prescribe respecting the movement of such commerce, and in so doing may provide rules for the regulation of the corporation, for the preservation of its solvency, for the safety of its employees and passengers, and make such other regulations as it may deem necessary for the effective control of the instrumentalities of interstate commerce. The power of Congress in this respect is plenary, and it may select its own instruments to engage in such commerce. It cannot be doubted that Congress may create a corporation to conduct interstate commerce and regulate all its affairs. Is it possible that it may do this and yet be impotent to regulate the affairs of corporations created by the states and engaged, by consent of the national power, in the same national business? The power to create and regulate national corporations as agencies of interstate commerce is conferred by the same clause of the Constitution as the power to regulate state corporations engaged in interstate commerce. Each has the same source, and the congressional power must be the same. Any other construction would permit the states to nullify the plenary power of Congress by the creation of corporations. I am not announcing any new doctrine, or advancing one step beyond the construction of Chief Justice Marshall, when I say that when the state corporation projects itself across the state line and engages in interstate commerce, it becomes subject to the same regulations, with respect to all its affairs directly or indirectly relating to such business as it would be if created by Congress itself.

"No state can, by merely creating a corporation, or in any other mode, project its authority into other states and across the continent, so as to prevent Congress from exerting the power it possesses under the constitution over interstate and international commerce or so as to exempt its corporation engaged in interstate commerce from obedience to any rule lawfully established by Congress for such commerce."<sup>18</sup>

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<sup>18</sup> *Northern Securities Co. v. U. S.*, 193 U. S., 197, 345.

But we may go a step further. Under the power to regulate commerce, Congress has plenary power to inhibit altogether such commerce as in its opinion is injurious to the Nation, or to prescribe as a condition the rules under which it shall be carried on. Were this but a single government and the power to regulate the commerce of the country vested in Congress, I know of no provision of the Constitution of the United States that would limit that power to mere regulation of the carriage of persons or property and would not permit Congress, when in its judgment there arose a just cause, to inhibit it altogether.<sup>19</sup>

It may be as necessary in the public interest to inhibit commerce between the states as with foreign nations. The power of complete regulation, of itself, must include the power of inhibition. Some power must judge when commerce should be permitted and the rules by which the same should be governed; but if Congress may only regulate but not prohibit, its power over commerce is not plenary, as has often been said by the Supreme Court. I submit that when Congress is legislating under its admitted power over interstate commerce, it alone can judge whether a particular commerce is injurious to the public interest or not, and the remedy of the people, if any, against the abuse of such power, must be an election of members of Congress who will obey their will.<sup>20</sup>

In the *Lottery Cases* the court held that Congress may inhibit altogether the transportation of lottery tickets. The reasoning of the court fully sustains the position that Congress under the power to regulate commerce, may inhibit commerce among the states. The court cited the exercise of the power to inhibit commerce in the Sherman Act as an illustration.

In the *Anti-Trust Cases* (*Standard Oil and American Tobacco Cases, supra*), the Circuit Courts held that Congress had power to prohibit corporations combined for the purpose of restraining commerce, from engaging in any commerce whatever.

If within its power to regulate commerce Congress may absolutely inhibit such commerce, of course it may prescribe the rules under which it shall be conducted; but it is not necessary to go to

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<sup>19</sup> *Crutcher v. Kentucky*, 141 U. S., 47; *Brown v. Houston*, 114 U. S., 622, 630; *Butterfield v. Stranahan*, 192 U. S., 492; *U. S. v. Marigold*, 9 How., 560.

<sup>20</sup> *Butterfield v. Stranahan*, 192 U. S., 492; *In re Rapier*, 143 U. S., 110; *The Lottery Case*, 188 U. S., 354; *United States v. Standard Oil Co.*, 173 Fed., 177; *United States v. American Tobacco Co.*, 164 Fed., 700.

the length that Congress has power to absolutely inhibit commerce between the states. Within its power of regulation it may prescribe what corporations may so engage in such commerce. It may prohibit corporations organized under foreign governments from engaging therein, or prescribe the regulations under which they may so engage. It may equally prohibit state corporations from so engaging, or as a condition prescribe the regulations under which they may engage. Such conditions may include the terms under which the capital stock shall be issued and paid for, and proper guaranties to insure the solvency of such corporations, to the end that their securities may be safe investments for the people, and that they may be able to perform their obligations as instrumentalities of commerce. It may regulate their business so as to prohibit them from monopolizing the commerce of the country or entering into combinations in restraint of trade. The means by which Congress shall keep open and free the avenues of commerce are for it alone to decide so long as they are appropriate and are not prohibited.

*If the propositions thus far laid down are correct, then the states may not exclude a corporation created by Congress to engage in interstate commerce, nor prescribe the terms of its admission to carry on business.*<sup>21</sup>

In considering this question there are certain fundamental rules it is well to keep in mind. No one questions the proposition that corporations not engaged in interstate commerce have no rights beyond the states in which they are created, and that other states may impose conditions, arbitrary or otherwise, upon their admission into such states and their right to transact business therein. Such cases are the *Bank of Augusta v. Earl*<sup>22</sup>; *Paul v. Virginia*<sup>23</sup>; *Horn Silver Mining Co. v. New York*<sup>24</sup>; *Security Mutual Life Ins. Co. v. Pruett*,<sup>25</sup> and other cases cited in the *Western Union and Pullman Cases*, *supra*.

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<sup>21</sup> *Western Union Tel. Co. v. Kansas*, 216 U. S., 18; *Pullman v. Kansas*, 216 U. S., 56; *Crutcher v. Kentucky*, 141 U. S., 47.

<sup>22</sup> 13 Peters, 519.

<sup>23</sup> 8 Wallace, 168.

<sup>24</sup> 143 U. S., 314.

<sup>25</sup> 202 U. S., 246.

The foregoing rule, however, does not apply to corporations engaged or intending to engage in interstate commerce.<sup>26</sup>

Another proposition which may be conceded is that the states may tax the property of a foreign corporation situated within the state, whether the corporation be engaged in interstate commerce or not. This may take the form of a tax upon the property having an actual situs in the state, or upon a proportion of the capital stock fairly intended to represent the property and business situated in the state, but it cannot go beyond a fair representation or equivalent of such property engaged in the business in the state.<sup>27</sup>

The only limitation upon the right of the state to thus tax the property of foreign corporations is the 14th Amendment to the federal constitution prohibiting states from denying to persons (held to include corporations) the equal protection of the laws, under which provision the states may not tax the property of a foreign corporation at a different rate than that of a domestic corporation.

Again, the states may not tax property situated beyond the state, and this cannot be done under the guise of a license tax upon the entire stock of the corporation.<sup>28</sup>

I believe the natural conclusion from the foregoing propositions is, that if Congress may incorporate a company and authorize it to engage in interstate commerce or carry the mails as a post road, it cannot be excluded from any state nor admitted only upon such onerous conditions as would cast a burden upon interstate commerce. The only question about which there seems to be some doubt is whether the state may exclude such a corporation from engaging in any domestic commerce or exercising any powers other than those strictly limited to carrying out the powers conferred upon Congress by the Constitution. I believe the *Western Union* and *Pullman Cases* to be conclusive upon this point, and this conclusion is borne out by the dissenting opinion of Mr. Justice Holmes, who discusses the identical question. We may even concede, for the purposes of this argument, that Mr. Justice Holmes is right when applying the principle stated by him, to corporations formed under the laws of the various states and seeking to do business in another state than that of their organization.

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<sup>26</sup> *Western Union Tel. Co. v. Kansas; Pullman v. Kansas, supra, and authorities therein cited.*

<sup>27</sup> *Postal Telegraph Cable Co. v. Adams*, 155 U. S., 696.

<sup>28</sup> *Western Union Tel. Co. v. Kansas; Pullman v. Kansas, supra, and authorities therein cited.*

But this does not meet the proposition I make: that no such limitations can be imposed upon federal corporations thus seeking to do business in the various states. The Chief Justice, in *Osborn v. Bank* (page 867), said:

"If the trade of the bank be essential to its character as a machine for the fiscal operations of the government, that trade must be as exempt from state control as the actual conveyance of the public money. Indeed, a tax bears upon the whole machine; as well upon the faculty of collecting and transmitting the moneys of the nation, as on that of discounting the notes of individuals. No distinction is taken between them."

It seems to me that this is conclusive of the question. The business of carrying persons and property within the state, intermingled with interstate commerce, is as necessary for the public convenience and the trade of the nation as well as the prosperity of the corporation, as for a bank to engage in the private business of discounting paper. It is as necessary that railways engaged in carrying the mails should also engage in other commerce as it is that banks should engage in business other than as fiscal agents of the government. If Congress may incorporate a company proper and necessary to carry out the express powers conferred by the federal constitution, which company may incidentally do some business or perform acts not absolutely necessary to the exercise of such power, but necessary to its successful operation as a company, then Congress may certainly protect that company and its business in or among the various states. I believe, therefore, that when Congress under its power to regulate commerce, which includes all of the instrumentalities of such commerce, decides that a corporation is a reasonable, proper and convenient instrumentality for carrying out its acknowledged powers, it may permit such corporation to engage in business in the various states, although part of that business may not be interstate commerce nor directly pertain to the exercise of governmental powers.

*Frank B. Kellogg.*

*St. Paul, November 14, 1910.*